83-2077

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LINDSEY M. SCOTT,

Petitioner,

v.

LARRY DIXON, RICHARD L. KELLY, LARRY LATHAM, WAYNE E. FLOYD and AMERICAN FIRE & CASUALTY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Must a Section 1983 Plaintiff allege and prove that he has no adequate postdeprivation due process remedy and is he precluded as a matter of law from claiming § 1983 jurisdiction if he admits that he has a tort remedy under state law?

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Respondent Larry Dixon respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals For The Eleventh Circuit entered in this proceeding on the 15th day of December, 1983.

OPINION BELOW

The opinion of the Court of Appeals appears in the appendix hereto. The opinion of the District Court also appears in the appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on the 15th day of December, 1983. A timely petition for rehearing was

denied on the 23rd day of March, 1984, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 42 U.S.C.A. § 1983 (1981).

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

42 U.S.C.A. § 1983 (1981).

STATEMENT OF THE CASE

In this case, Petitioner Larry Dixon was sued in Federal Court for an alleged deprivation of liberty and property without due process of law in violation of 42 U.S.C. § 1983. The Plaintiff Lindsey M. Scott also attached to the § 1983 complaint three pendent state law claims for false imprisonment, malicious arrest, and malicious prosecution.

While Dixon had held public office as Chairman of the Glynn County Board of Commissioners, he had taken out a warrant for "endangering a security interest" in violation of Georgia Code Annotated § 26-1707 against Scott. This arose out of a purely private business transaction between Scott and Dixon over the sale of a truck and had nothing whatever to do with Dixon's public duties.

Dixon obtained this warrant from the Clerk of the State Court of Glynn County and he held the warrant in his possession for five months.

On January 19, 1981, after he had left public office, Dixon encountered two police officers in a restaurant, asked them if the warrant was still good, and requested that they accompany him to Scott's house.

According to Scott's allegations, Dixon demanded the truck from Scott at Scott's house. When Scott refused to give him the truck, Dixon left and the police officers arrested Scott. After an incarceration of only about thirty

minutes, Scott was released and the charge was later dismissed.

The two police officers were also sued in this case.

In reversing the grant of summary judgment to the police officers, the Court of Appeals stated:

> "If Officers Kelly and Latham allowed Dixon to use the criminal warrant to try to collect a debt before they effected the Appellant's arrest, a question has been raised as to their good faith."

Although finding that the Clerk of State Court was immune from liability because he was performing a judicial function in issuing the warrant, the Court of Appeals held that the allegation of a conspiracy between Dixon and the Clerk and the police officers was a sufficient basis for finding § 1983 jurisdiction against Dixon. The Court of Appeals stated:

> "Dixon acted pursuant to a procedural scheme which permitted through its abuse the arrest of Scott for not paying a debt. Dixon clearly acted in conjunction with and obtained significant aid from state officials. The evidence permits a conclusion that Dixon conspired with Floyd to obtain the warrant, acted in bad faith in securing it, and used his prior position to procure its execution."

Dixon was at the time of this arrest a private citizen. There is no evidence that the Clerk of State Court or the police officers received any benefit from the arrest of Scott. There is no evidence that this arrest was part of any state policy or pattern of state activity.

Instead, the evidence in the case clearly demonstrates that this was an isolated instance of a private citizen causing another private citizen to be arrested for purely private reasons and that it was brought in Federal Court under § 1983 only through the allegations that Dixon

"conspired" with a judicial officer to get the warrant issued and that the police officers who executed the warrant did not act in good faith when the arrest was made.

REASON FOR GRANTING THE WRIT

The Plaintiff below, Mr. Scott, makes no claim that he does not have an adequate state remedy for this alleged deprivation of his liberty and property. Rather, he attaches his state law claims to his § 1983 complaint under pendent jurisdiction.

The laws of the State of Georgia provide a perfectly adequate remedy for Plaintiff Scott by authorizing suits for false imprisonment, malicious arrest and malicious prosecution.

Indeed, there is no substantive difference between Plaintiff Scott's § 1983 claim and his state law claims.

Since Plaintiff Scott has a perfectly adequate state remedy, there is no logical reason why he should be allowed to clog up the Federal Court with a claim which belongs in State Court.

There is no evidence and even no allegation that Plaintiff Scott has been or will be deprived of any postdeprivation procedural due process in State Court.

Plaintiff Scott makes no attack at all upon any aspect of the postdeprivation procedural due process scheme provided under state law. Instead, he avidly seeks to avail himself of that state procedural due process through assertion of the pendent state law tort claim.

In *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 2d 420 (1981), the Supreme Court held that the negligent deprivation of a prisoner's property does not violate due process if adequate state remedies are available to redress the wrong. Parratt held that in order to state a claim for relief in Federal Court under Section 1983, a Plaintiff must show that available state proce-

dures were not adequate to compensate him for the deprivation of his property.

In *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981), the Ninth Circuit applied the *Parratt* principle to a § 1983 claim for assault and battery. In *Rutledge*, the Ninth Circuit held that, in the absence of suggestion that the postdeprivation procedures under state law were inadequate, the Federal Court must conclude that the alleged deprivation was not without due process of law and therefore the Plaintiff would be relegated to his tort law remedy under Arizona state law.

There seems to be no logical reason for drawing a distinction between property deprivations and state tort deprivations of liberty such as malicious prosecution or false arrest.

In *Vicory v. Walton*, 721 F.2d 1062 (6th Cir. 1983), the Sixth Circuit stated:

> "Section 1983 was not meant to supply an exclusive federal remedy for every alleged wrong committed by state officials. Rather, the statute is a remedy for only those wrongs which offend the Constitution's prohibition against property deprivations without procedural due process. Thus we hold that in Section 1983 damage suits claiming the deprivation of a property interest without procedural due process of law, the Plaintiff must plead and prove that state remedies for redressing the wrong are inadequate. In a procedural due process case under Section 1983, the Plaintiff must attach the State's corrective procedure as well as the substantive wrong. In the instant case the Plaintiff has neither alleged nor shown any significant deficiency in the State's remedies."

In *Palmer v. Hudson*, 697 F.2d 1220 (4th Cir. 1983) cert. granted, —— U.S. ——, 103 S.Ct. 3535, 77 L.Ed.2d 1386 (1983), the Fourth Circuit stated:

> "The District Court granted defendant's motion for summary judgment, reasoning that under Parratt v.

> Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), the intentional destruction of a prisoner's property is not a violation of due process, when the prisoner has an adequate remedy under state law. The district court also ruled that, accepting Palmer's allegations of harassment as true, it could not conclude that the allegations were of constitutional significance. We agree that under Parratt due process is not violated when a state official intentionally deprives an individual of his property by a random and unauthorized act if the state provides an adequate postdeprivation remedy."

Under the above cases, it seems clear that a Claimant under § 1983 alleging a deprivation of liberty or property without due process of law must at least *allege* that state postdeprivation procedures are inadequate.

Repeatedly at both the District Court level and in the Court of Appeals, Petitioner Dixon contended that this case should be dismissed from Federal Court because the Plaintiff Scott admittedly has a perfectly adequate remedy under state law.

In its decision, the Eleventh Circuit chose only to address the question of whether there was sufficient evidence of "state action" to justify § 1983 jurisdiction.

However, it is the position of Petitioner Dixon that it is not enough that there is deprivation of due process under color of state law.

Rather, Petitioner Dixon contends that the § 1983 Claimant must allege and at least make out a prima facie case that he has no adequate postdeprivation remedy under state law.

In this case, Plaintiff Scott attached his state law claims for false imprisonment, malicious arrest and malicious prosecution to his § 1983 complaint as separate counts under pendent jurisdiction. Georgia law clearly provides a postdeprivation tort remedy for such causes of action.

Therefore, by the allegations shown on the face of his complaint, Plaintiff Scott cannot possibly have a § 1983 action under the circumstances of this case because he has a totally adequate state law remedy.

Consider again the facts of this case as determined by the Court of Appeals:

(1) Petitioner Dixon acted as a private citizen in securing a warrant.

(2) According to the Court of Appeals, Petitioner Dixon "acted pursuant to a procedural scheme which permitted through its abuse the arrest of Scott for not paying a debt."

(3) The Court of Appeals found that the evidence permitted an inference that Dixon "conspired" with the Clerk of Court to obtain a warrant and "used his prior position to procure its execution".

(4) The Court of Appeals stated that a question was raised as to the good faith of the police officers who made the arrest because they allegedly allowed Dixon to use the criminal warrant to try to collect a debt before they effected Scott's arrest.

(5) Plaintiff Scott made the exact same facts and allegations the basis for pendent jurisdiction claims under state tort law for false imprisonment, malicious arrest and malicious prosecution.

Under the above set of facts and claims, any state tort Plaintiff in a malicious prosecution action can subject any private citizen who takes out a warrant to a § 1983 action in Federal Court simply by alleging that the private party Defendant "conspired" with a judicial officer to get a warrant issued or by alleging that the police officers making the arrest did not act in good faith either because they were too slow or too fast.

It is the position of Petitioner Dixon that the Plaintiff in any such tort action must allege and prove that he does not have an adequate postdeprivation remedy in state court. Where, as here, a § 1983 Plaintiff admits in his complaint that he has an adequate state postdeprivation tort remedy, there can be no § 1983 jurisdiction as a matter of law.

CONCLUSION

The Court of Appeals erred as a matter of law in failing to hold that the Plaintiff's complaint is barred as a matter of law because Plaintiff has an adequate remedy under state law.

This the —— day of ————————, 1984.

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8376

LINDSEY M. SCOTT,
Plaintiff-Appellant,

versus

LARRY DIXON, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

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[Filed Mar. 23, 1984]

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 15, 1983, 11 Cir., 1983, F.2d ——).

Before HATCHETT and CLARK, Circuit Judges, and SCOTT *, District Judge.

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* Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, was a member of the panel that heard oral arguments but due to his death on May 12, 1983, did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. Section 46(d).

PER CURIAM:

The petition for rehearing having been considered by the two members of the panel, the same is hereby DENIED.

A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor it it, rehearing en banc is DENIED.

ENTERED FOR THE PANEL AND THE COURT:

/s/ Thomas A. Clark
United States Circuit Judge

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 82-8376

D.C. Docket No. CV281-108

LINDSEY M. SCOTT,
Plaintiff-Appellant,

versus

LARRY DIXON, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

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[Filed April 5, 1984]

Before HATCHETT and CLARK, Circuit Judges, and SCOTT *, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

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* Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, was a member of the panel that heard oral arguments but due to his death on May 12, 1983, did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. § 46(d).

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED IN PART and REVERSED IN PART; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: December 15, 1983

For the Court: Spencer D. Mercer
Clerk

By: /s/ Wanda A. Godfrey
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8376

LINDSEY M. SCOTT,
Plaintiff-Appellant,

v.

LARRY DIXON, ET AL.,
Defendants-Appellees.

Dec. 15, 1983

Appeal from the United States District Court for the Southern District of Georgia.

Before HATCHETT and CLARK, Circuit Judge, and SCOTT *, District Judge.

CLARK, Circuit Judge:

In January 1980, defendant Larry Dixon sold a truck to plaintiff Lindsey Scott on credit. A dispute arose regarding the payment agreement. Plaintiff alleges that under the purchase agreement he was to paint Dixon's house in lieu of a $700 down-payment, trade in his old truck for credit of $600, and finance the $2,800 balance

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* Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, was a member of the panel that heard oral arguments but due to his death on May 12, 1983 did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. § 46(d).

pursuant to a retail installment contract. Plaintiff asserts that Dixon refused to allow him to paint the house but all installment payments were timely tendered. Dixon denies that he consented to permit Scott to work off part of the payment and that the payments were otherwise timely. The district court found plaintiff's version convincing, including that Scott gave Dixon a $700 check on the provision it not be cashed since sufficient funds were not available. The lower court found that Dixon wanted to repossess the truck on the allegation of improper insurance coverage.

Dixon, at the time Chairman of the Board of Commissioners, testified that on August 6, 1980 he sought legal advice from defendant Floyd, Clerk of the State Court of Glynn County, Georgia, on how to obtain the truck or payment therefor. Dixon swore out an affidavit for the issuance of a warrant for Scott's arrest, charging plaintiff with "endangering a security interest" in violation of Ga.Code Ann. § 26-1707 (1977).[1] Defendant Floyd issued the criminal warrant to Dixon. Floyd directed Dixon that he should take the warrant to the police for enforcement.[2]

Dixon kept the warrant in his possession for five months during which time he threatened plaintiff with legal action if the latter failed to pay for or return the

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[1] That section is presently codified at Off.Code Ga.Ann. § 16-9-51 (1982).

[2] Floyd issued the warrant pursuant to Ga.Code Ann. § 27-102 (1978). That section provided in pertinent part:

> Any judge of a superior, city, or county court, or justice of the peace, or any municipal officer clothed by law with the powers of a justice of the peace, may issue his warrant for the arrest of any offender against the penal laws, based either on his own knowledge or the information of others given to him under oath.

Ga.Code Ann. § 27-102 (1978). This section was amended in 1983 and recodified at Off.Code Ga.Ann. § 17-4-40 (Supp. 1983).

truck. On the evening of January 19, 1981, Dixon who was no longer Commissioner, "ran into" two police officers (defendants Kelley and Latham) at a restaurant, inquired into the continued viability of the warrant, and requested that they accompany him to plaintiff's home in the event of violence.

Arriving at plaintiff's home, Dixon approached Scott and requested the truck keys. The officers remained in the police car. When plaintiff refused to accede to Dixon's wishes, Dixon left in his own car and the officers arrested Scott. Subsequent to his incarceration, plaintiff was released on bond and the charge ultimately dismissed.[3]

Alleging a deprivation of liberty and property without due process of law in violation of 42 U.S.C.A. § 1983 (1981), Scott sued Dixon, Floyd, Kelley, Latham, and American Fire and Casualty Company (AFCC). Scott also alleged three pendent state law claims.[4] Defendants sought summary judgment on the ground that, among other things, plaintiff's claim fell outside the jurisdictional scope of section 1983.[5] Defendant AFCC also filed a motion for judgment on the pleadings.

Subsequent to oral argument, the district court granted the summary judgment motions of Dixon, Floyd, Kelley, and Latham. The district court found no section 1983 claim in that Dixon secured the warrant as a private citizen, Floyd enjoyed absolute immunity in exercising a discretionary judicial function and Kelley and Latham enjoyed qualified immunity in carrying out their duties in good faith. The court also granted AFCC's motion for

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[3] Apparently, no evidence existed that Scott had committed the charged offense.

[4] The state law claims were for false imprisonment, malicious arrest, and malicious prosecution. Record at 17-21.

[5] The motions and supporting materials of the original defendants are found in the Record at 307-45, 359-71, 372-80.

judgment on the pleadings, finding that AFCC bonded only the County Board of Commissioners and not Floyd. The motions of Alma and Mabel Dixon were overruled and denied, but based on their prior rulings, the district court declined to exercise ancillary jurisdiction over the fraudulent conveyance claim and dismissed it sua sponte. The lower court also dismissed the pendent state claims. After an independent review of the evidence viewed in the light most favorable to plaintiff, and upon application of the law governing these facts, we find the district court order granting summary judgments erroneous with respect to Dixon, Latham and Kelley. We reverse and remand.

Dixon

A claim grounded in section 1983 has as a prerequisite a finding of state action. Plaintiff must also show causal deprivation without due process of a right secured him by the federal laws. *Brown v. Miller*, 631 F.2d 408, 410 (5th Cir. 1980). Plaintiff's complaint alleges deprivation of both a liberty and property right. At the summary judgment hearing, Dixon's attorney "assume[d] that [Scott] was deprived of due process." Record Vol. 5 at 7. Likewise, the district court stated that "assuming a deprivation, it did not occur 'under color of state law.'" Record at 629. We therefore look only to the question of state action.

In the instant case, the district court found that Dixon "obtained the warrant as a private citizen" and thus did not act under color of state law. Both *Lugar v. Edmondson Oil Co., Inc.*,[6] 457 U.S. 922, 102 S.Ct. 2744, 73

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[6] The president and sole stockholder of Edmondson Oil petitioned pursuant to state law for a prejudgment attachment of Lugar's property. The petition simply alleged in conclusory terms that Lugar might dispose of his property in order to defeat creditors. A state trial judge later dismissed the attachment because Edmondson Oil had failed to carry the burden of establishing the

L.Ed.2d 482 (1982), and *Morrison v. Washington County, Alabama*,[7] 700 F.2d 678, 683-84 (11th Cir. 1983), were decided since the district court considered this case. These cases make clear the proposition that a private party acting pursuant to state law or in conjunction with state officials may, in certain circumstances, incur liability under section 1983. The conduct causing deprivation of the federal right must be "fairly attributable to the state." *Lugar*, 457 U.S. at 937, 102 S.Ct. at 2754, 73 L.Ed.2d at 495. This requirement is satisfied by a showing that the deprivation resulted from "the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible" and that "the party charged with the deprivation [is] a person who may fairly be said to be a state actor [either] because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state." *Id.*

In the instant case, the state of Georgia provided a statutory scheme authorizing criminal prosecution of a person who endangers a security interest. Ga. Code Ann. § 26-1707. A state official issued and state officials executed a criminal warrant pursuant to the statute. Dixon acted pursuant to a procedural scheme which permitted through its abuse the arrest of Scott for not paying a debt. Dixon clearly acted in conjunction with and ob-

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grounds for attachment. *Lugar v. Edmondson Oil Co., Inc.*, 639 F.2d 1058 (4th Cir. 1981). In the present case, a citizen may also have made private use of a state procedure with the help of state officials.

[7] A doctor at the Washington County hospital determined that a patient suffering from delirium tremens, a severe form of alcohol withdrawal, should not remain at the hospital. He requested that a staff member get the sheriff to come and remove the patient. The patient was then taken to the county jail where he later died of alcohol withdrawal. The court found that the doctor, although a private citizen, had "acted together with" and "obtained significant aid from state officials." 700 F.2d at 684.

tained significant aid from state officials. The evidence permits a conclusion that Dixon conspired with Floyd to obtain the warrant, acted in bad faith in securing it, and used his prior position to procure its execution. The appellant in response to the motion for summary judgment asserted that Dixon and others knowingly misused state procedure in violation of Scott's civil rights and that the procedure itself was invalid. Whether Dixon was acting as Commissioner or as a private citizen, the district court erred in finding an absence of genuine issues of material fact in light of *Lugar* and *Morrison, supra.* On the record before us in light of the controversy in the evidence, we cannot say as a matter of law that Dixon's actions were completely outside the purview of section 1983. We emphasize that we in no way intimate that every affiant to a criminal warrant engages in state action of a constitutional dimension. *Accord Lugar v. Edmondson Oil Co.*, 457 U.S. at 942, n. 23, 102 S.Ct. at 2757 n. 23. Nor do we suggest that Dixon is or is not liable under section 1983. We merely find that summary judgment was improvidently granted.

Floyd

In order to determine whether absolute immunity extends to Floyd, it is important to consider the "reasons underlying the creation of the immunity shield." *McCray v. Maryland*, 456 F.2d 1, 3 (4th Cir. 1972). The reasons for extending judicial immunity are to protect those officials with discretionary power similar to that exercised by a judge and thereby to ensure courageous exercise of that discretionary power. *Id.* The question which must be answered with regard to the extension of absolute judicial immunity, therefore, is whether the act performed by the officer is discretionary or ministerial in nature.

In this case, the district court correctly found that State Court Clerk Floyd exercises a discretion normally reserved to the judiciary. Floyd is empowered by the

1945 Acts p. 1095 § 4 to issue criminal warrants.[8] In deciding whether to issue such warrants, he must determine the law applicable to the complaint being lodged by the affiant and whether or not probable cause exists. Since Floyd performs a function normally handled by a judge, he falls within this circuit's narrow extension of absolute judicial immunity to court clerks.[9]

If Floyd were a judge, his absolute immunity would be assured despite the assertion by the appellant that Dixon and Floyd conspired with one another or reached an understanding about the issuance of a warrant to be used as a lever to pry possession of the truck from the appellant. The Supreme Court considered the issue of judicial immunity in *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). *Stump* provides that a judge will be shielded from liability if he has not acted in the "clear absence of all jurisdiction," 435 U.S. at 357, 98 S.Ct. at 1105, 55 L.Ed.2d at 339 (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351, 20 L.Ed. 646 (1872)), and if his act is a judicial one. 435 U.S. at 360-62, 98 S.Ct. at 1106-07, 55 L.Ed.2d at 341-42. *Stump* also states that if judicial acts are done within his subject matter jurisdiction he will not be liable even if he acts in error, maliciously or in excess of his authority. 435 U.S. at 357, 98 S.Ct. at 1105, 55 L.Ed.2d at 339.

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[8] The 1945 Act provides:

> Section 4. Said Act is further amended by adding at the end of Section 10 and as a part thereof the following language:
>
> "In addition to the duties enumerated, the Clerk of the City Court of Brunswick and his deputies shall be authorized and empowered to administer all oaths in connection with the issuance of attachments, garnishments, dispossessory and distress warrants and other mense process, and other types of warrant and writs, both civil and criminal, which the Judge of said court can administer, and to issue in the name of the Judge of said court all such warrants and writs."

[9] *Williams v. Wood*, 612 F.2d 982, 985 (5th Cir. 1980); *Tarter v. Hury*, 646 F.2d 1010 (5th Cir. Unit A 1981).

Since Floyd issued the warrant against Scott under the authority granted by Georgia law, he does not appear to have acted in "the clear absence of all jurisdiction." The factors which determine whether an act is judicial "relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." 435 U.S. at 362, 98 S.Ct. at 1107, 55 L.Ed.2d at 342. Applying that test to the present case, it appears that there was a judicial act in this case. The issuance of a warrant would be a function normally performed by a judge. *See Brewer v. Blackwell*, 692 F.2d 387, 396 (5th Cir. 1982); *Keeton v. Guedry*, 544 F.2d 199, 200 (5th Cir. 1976). By going to the clerk's office to swear out the warrant, Dixon was dealing with Floyd in his "judicial" capacity.

Floyd, therefore, is immune even if he did conspire with Dixon by issuing a criminal arrest warrant to collect a debt. A finding of immunity for Floyd, however, is not determinative of Dixon's possible liability. As the Supreme Court decided in *Dennis v. Sparks*, 449 U.S. 24, 27, 101 S.Ct. 183, 186, 66 L.Ed.2d 185, 189 (1980), the dismissal on immunity grounds of a § 1983 action against a judge does not require dismissal as to the private parties involved. In *Dennis*, the judge had allegedly been bribed by one of the parties to the case to issue an injunction. As the Court noted, "[u]nder these allegations, the private parties conspiring with the judge were acting under color of state law; and it is of no consequence in this respect that the judge himself is immune from damages liability." 449 U.S. at 28, 101 S.Ct. at 186, 66 L.Ed.2d at 190.

Kelley and Latham

Police officers do not enjoy absolute immunity from civil liability for § 1983 violations. Instead, they require a qualified immunity only for the good faith performance of their duties. *Pierson v. Ray*, 386 U.S. 547, 87

S.Ct. 1213, 18 L.Ed.2d 288 (1967). Since the Supreme Court decision in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the standard for gauging the good faith of government officials, including law enforcement officials, has been an objective one. Officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818, 102 S.Ct. at 2738, 73 L.Ed.2d at 410.

The district court based its finding of good faith on the part of Officers Kelley and Latham on the appellant's failure to rebut the testimony of the officers that they were simply carrying out their duties, or to produce evidence which would support an inference of bad faith. In reaching that decision, however, the district court overlooked a genuine issue of material fact regarding the manner in which the arrest warrant was executed. Officers Kelley and Latham did testify that they simply executed a facially valid arrest warrant given them by Dixon. Both testified that they were in possession of the warrant from the time Dixon approached them about executing it until Scott was delivered to the sheriff's office.

To controvert this, the appellant submits evidence inferring that the police accompanied Dixon to the Scott home in an effort to aid him in reclaiming the truck. Both the appellant and his wife testified in deposition that Dixon showed them the warrant and threatened to have Scott arrested if he did not turn over the keys. Only after the Scotts refused to comply did Dixon leave their home and turn over the warrant to the police waiting at the end of the driveway. Dixon also testified that he had the warrant in his possession when he spoke with the Scotts.

If Officers Kelley and Latham allowed Dixon to use the criminal warrant to try to collect a debt before they effected the appellant's arrest, a question has been raised

as to their good faith. The Tenth Circuit in *Lessman v. McCormick*, 591 F.2d 605, 611 (1979), found that allegations that the police arrested a woman on a warrant for overtime parking in order to aid a bank to collect its debt were sufficient to state a cause of action for deprivation of liberty under color of state law. The appellant in the present case has not only alleged but also testified to a similar deprivation. As the Court in *Harlow*, *supra*, noted: "By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct . . . Where an official *could be expected to know* that certain conduct would violate statutory or constitutional rights he should be made to hesitate . . ." 457 U.S. at 819, 102 S.Ct. at 2739, 73 L.Ed.2d at 411 (emphasis added). Because the district court erred in finding an absence of a genuine issue of material fact with regard to the entitlement of Kelley and Latham to good faith immunity for their actions, we hold that summary judgment with respect to them was improperly granted.

AFFIRMED IN PART, REVERSED IN PART and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

Civil Action No. CV 281 108

LINDSEY M. SCOTT

v.

LARRY DIXON, ET AL.

ORDER

The plaintiff brings this civil rights action pursuant to 42 U.S.C. § 1983 for deprivation of civil rights under color of state law stemming from his arrest on January 19, 1981 pursuant to a warrant which had been issued on the affidavit of defendant Larry Dixon. The action is brought in five counts; Count I is a claim under § 1983, Counts II-IV are pendent state law claims and Count V is a claim for fraudulent conveyance brought against defendants Larry Dixon and Alma and Mabel Dixon, Larry Dixon's wife and mother, respectively. All defendants filed motions for summary judgment. Additionally, defendant American Fire and Casualty Company filed a motion for judgment on the pleadings. Oral argument was heard on April 19, 1981 at which time the court orally granted the summary judgment motions of defendants Larry Dixon, Floyd, Kelly and Latham. The court granted American Fire and Casualty Company's motion for judgment on the pleadings. The motions of Alma and Mabel Dixon for summary judgment on Count V were overruled and denied; however, based upon the prior rulings, the court declined to exercise ancillary jurisdiction

over Count V and dismissed it sua sponte. All pendent state law claims, Counts II-IV, were dismissed. The following is a memorandum concerning the grant of summary judgment to defendants Larry Dixon, Floyd Kelly and Latham and the grant of judgment on the pleadings to American Fire and Casualty Company.

On a motion for summary judgment, the moving party bears the burden of showing that there is no genuine issue of fact and that it is entitled to judgment as a matter of law. *Frank C. Bailey Enterprises, Inc. v. Cargill, Inc.*, 582 F.2d 333 (5th Cir. 1978). The non-moving party must then set forth specific facts showing that a genuine issue remains for trial. *Id.* In this case the movants have supported their motions with depositions and affidavits establishing the following material facts.

Plaintiff purchased a truck from Larry Dixon on January 21, 1980. In lieu of a $700 down payment, plaintiff also wrote Dixon a $700 check which Dixon promised not to cash, both parties apparently agreeing that the check would not be covered by plaintiff's available funds in the bank. A dispute later developed; plaintiff claims that although he was ready to paint Dixon's house, Dixon wanted the $700 in cash. Dixon also apparently wanted to repossess the truck, there being a further dispute as to whether the truck was properly insured, as well as whether the plaintiff was keeping up with his payments.

On August 6, 1980, Dixon procured a warrant for the arrest of the plaintiff for "endangering a security interest," a violation of *Ga. Code Ann.* § 26-1707. The warrant was issued by defendant Wayne Floyd, Clerk of the State Court of Glynn County, Georgia. Dixon kept the warrant in his possession until January 19, 1981, when he delivered it for execution to Glynn County Police Officers, Kelly and Latham, also defendants in this action. Dixon and the officers drove to the plaintiff's house, where Dixon apparently attempted to coerce the plaintiff into

giving up the truck by threatening him with arrest. During this conversation on the plaintiff's front steps, the officers remained in their squad car. There is no evidence that the officers overheard the conversation between Dixon and the plaintiff. After the plaintiff refused to give up the truck, Dixon drove away in his own car and the officers arrested the plaintiff. The plaintiff posted bond later that night and the charge was subsequently dismissed.

Dixon was a member of the Glynn County Board of Commissioners at the time the warrant was issued. His term in office expired on December 31, 1980. There is no evidence that Dixon used his status as a County Commissioner to procure the warrant for the plaintiff's arrest. Neither is there any evidence of a conspiracy between defendant Dixon and another county official, either defendants Floyd, Kelly or Latham, regarding the plaintiff's arrest.

In order to be entitled to relief under 42 U.S.C. § 1983, the plaintiff must show (a) that the defendant deprived him of a right secured to him by the Constitution or federal law and (b) that the deprivation occurred under color of state law. *Brown v. Miller*, 631 F.2d 408, 410 (5th Cir. 1980). Here, assuming a deprivation, it did not occur "under color of state law." Even though Dixon was a county commissioner at the time the warrant was issued, he obtained the warrant as a private citizen. "[T]he act of one who is a state officer, not taken by virtue of or clothed with his state authority, will not be considered as done under color of state law simply because the individual, although pursuing private aims, happens to be a state officer." *Id.* at 411. Floyd testified in his deposition that he often issued warrants to individual citizens and that the issuance of the warrant in this instance was to Dixon as a private citizen. There is no evidence that Dixon was acting under "authority" or "pretense" of state law in obtaining the warrant. *Dahl*

v. Akin, 630 F.2d 277 (5th Cir. 1980). Neither is there any evidence that defendant Dixon was acting "under color of state law" when he retained the warrant in his possession upon its issuance. Defendant Floyd testified in his deposition that when arrest warrants are issued, he may transmit them directly to the law enforcement agency responsible for execution or he may give the warrant to the complainant for transmittal to the proper law enforcement agency. In this case, the warrant was given to defendant Dixon who kept the warrant in his possession for over five months.

As Clerk of the State Court of Glynn County, defendant Floyd is empowered to issue arrest warrants in the name of the State Court Judge. Georgia Laws 1943, p. 702 as amended Georgia Laws 1945, p. 1092, 1095. The plaintiff has challenged the constitutionality of the special legislation permitting the clerk of the State Court of Glynn County to issue warrants; however, the court finds the challenge to be without merit. In issuing arrest warrants, the clerk exercises discretion normally reserved to the judiciary; therefore, in this instance, the clerk should be extended absolute judicial immunity from damages actions. *See Stump v. Sparkman*, 435 U.S. 349 (1978); *McCray v. Maryland*, 456 F.2d 1, 3 (4th Cir. 1972). *Cf. Williams v. Wood*, 612 F.2d 982 (5th Cir. 1980). Accordingly, defendant Floyd is immune from liability under 42 U.S.C. § 1983 for his actions in issuing the arrest warrant.

Police officers are entitled to qualified immunity from suit for official actions taken in good faith. *Turner v. Raynes*, 611 F.2d 92 (5th Cir. 1980). The officers have testified by deposition that they were simply carrying out their duties as police officers in executing the warrant and effecting the arrest of the plaintiff. The plaintiff has produced no evidence to rebut this or to support any inference of bad faith on the part of defendants Kelly and Latham. The warrant was valid on its face. The fact

that it did not contain the name of the State Court Judge of Glynn County is merely a technical defect and does not affect the validity of the warrant. *See Courtney v. Randolph*, 125 Ga. App. 581 (1972). Nor was the date on the warrant sufficient to put the officers on notice of a "stale" warrant. *Cf. Manning v. Mitchell*, 73 Ga. 660 (1885) (warrant nine years old did not provide basis for arrest).

Based upon the foregoing, the court concludes that the plaintiff's claims under 42 U.S.C. § 1983 must fall as the deprivation complained of did not occur "under color of state law." Further, the court finds that defendants Floyd, Kelly and Latham are immune from damages as a matter of law for actions taken in their official capacity regarding the plaintiff's arrest. The plaintiff has had an opportunity to depose the defendants and others but has been unable to produce anything other than conjecture and speculation to support his contention that a cause of action under 42 U.S.C. § 1983 exists. "In order to successfully defeat a motion for summary judgment however, more than mere allegations and conclusory statements must be offered." *United Steelworkers, Etc. v. University of Alabama*, 599 F.2d 56 (5th Cir. 1979). While the plaintiff may have claims at state law, the federal claim is without substance. Accordingly, summary judgment for defendants Larry Dixon, Floyd, Kelly and Latham is appropriate.

By its terms, the bond upon which American Fire and Casualty Company is sued in favor of the Glynn County Board of Commissioners. As the obligation does not run in favor of the plaintiff, judgment on the pleadings for American Fire and Casualty Company is appropriate. American Fire and Casualty's summary judgment motion is dismissed.

The plaintiff has filed a motion to reconsider the court's oral ruling on April 19, 1928 denying the plaintiff's motion to add Glynn County as a defendant and a

motion to reconsider the oral ruling granting judgment on the pleadings for American Fire and Casualty Company. Both of these motions are hereby overruled and denied.

SO ORDERED, this 22 day of May, 1982.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL
Judge, United States District Court
for the Northern District of Georgia,
Sitting by Designation

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

Civil Action File No. 281-108

LINDSEY M. SCOTT

vs.

LARRY DIXON, WAYNE E. FLOYD, AMERICAN FIRE & CASUALTY CO., RICHARD L. KELLY, LARRY LATHAM, ALMA C. DIXON and MABEL C. DIXON

JUDGMENT

This action came on for (hearing) before the Court, Honorable G. Ernest Tidwell, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that in accordance with the Order of this Court entered on May 24, 1982, judgment is entered against plaintiff, LINDSEY M. SCOTT, and in favor of defendants.

Dated at Brunswick, Georgia, this 2nd day of June, 1982.

HENRY R. CRUMLEY, JR.
Clerk of Court

/s/ Carolyn F. Rawland
Deputy Clerk